

## Can I Communicate Directly With The Adverse Party When Their Attorney Isn't Responding?

[RPC 4.2](#) states that in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order. Comment 3 states that the rule applies even though the person represented by a lawyer initiates or consents to the communication.

*How do you move forward when opposing counsel is unresponsive but makes no affirmative indication that their attorney-client relationship is terminated?*

The safest course of action is to ask the court for an order authorizing you to have direct contact with the adverse party.

Another possible approach is to consider that RPC 4.2's restrictions only apply when you *know* that a person is represented. The term "knows" is defined in [RPC 1.0A](#) as actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

One might argue that after several efforts to contact opposing counsel, including warning of the consequence of a failure to respond, and waiting a reasonable time for a response, a lawyer can justifiably conclude that they do not *know* that the adverse party is represented since a reasonable attorney would have responded under those circumstances. If considering that approach, a lawyer should document their repeated efforts at contact and warning of non-response. Keep in mind, however, unless mandated by law or court order, no ethics rule specifies that attorneys have to respond to other attorneys.

If direct contact with the adverse party is made, you should question the party again to see if they are represented. If they are, stop further communication and tell the party to refer the communication to their counsel. If the party says they terminated the representation, you should ask for a letter or email documenting the termination. Remember, RPC 4.2 applies even if the party initiates or consents to the communication.

In a nutshell, if opposing counsel isn't responding, document your repeated efforts at contact, including your statement of the consequence of continued non-response. Wait a reasonable amount of time. To be safe, get a court order authorizing direct contact. If that's not possible, and you intend to make direct contact with the adverse party, make sure you tell them to refer the communication to their attorney if they are still represented, and ask for documentation of termination if they say they aren't. If you have concerns, contact the WSBA Ethics Line at (800) 945-9722, ext. 8284.

